

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Kenneth R. Drefs, Jr.,
Plaintiff,

v.

Jody P. Weis, Superintendent of Chicago;
and the Police Board of the City of Chicago,

Defendants.

ENTERED
JUDGE NANCY J. ARNOLD-1732
NOV 23 2010
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DOROTHY BROWN CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL DEPUTY CLERK

No. 09 CH 29448

Judge Nancy J. Arnold

Calendar No. 11

MEMORANDUM OPINION AND ORDER

THIS CAUSE COMES TO BE HEARD on Plaintiff's complaint for administrative review of the order issued by the Police Board of the City of Chicago on July 16, 2009, discharging Plaintiff from service as a police officer. Plaintiff complains that the Board's findings are contrary to law and to the manifest weight of the evidence, and unsupported by substantial evidence in light of the whole record. Plaintiff also contends that the penalty of discharge was overly harsh, unreasonable, and arbitrary.

THE RECORD

Plaintiff Kenneth Drefs was a Chicago police officer on February 12, 2006, when he and two passengers were pulled over in Boone County, Illinois, by Deputy Edward Krieger. Deputy Krieger performed the standard field sobriety tests and arrested Plaintiff for driving under intoxication. A Boone County jury acquitted Plaintiff of all criminal charges, but Defendant Superintendent Weis filed charges with the Chicago Police Board ("Board"), which ultimately ordered Plaintiff's discharge.

The Board found that Plaintiff was guilty of violating Rule of Conduct 1 ("Violation of any law or ordinance"), by driving a motor vehicle while intoxicated, in violation of 625 ILCS 5/11-

501(a)(2). The Board found Plaintiff was not guilty of violating Rule 1 by failing to signal at the time required when making a turn, in violation of 625 ILCS 5/11-804.

The Board found that Plaintiff was guilty of violating Rule of Conduct 2 (" Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department"), by driving under the influence of alcohol, failing to submit a report of his arrest to his unit commander in violation of General Order 93-03, Addendum 5B, Section IV, and by being intoxicated while off duty. The Board found Plaintiff was not guilty of violating Rule 2 by failing to signal at the time required when making a turn.

The Board found that Plaintiff was guilty of violating Rule of Conduct 6 ("Disobedience of an order or directive, whether written or oral"), by failing to submit a report of his arrest to his unit commander in violation of General Order 93-03, Addendum 5B, Section IV.

The Board found that Plaintiff was guilty of violating Rule of Conduct 15 ("Intoxication on or off duty"), by being intoxicated at the time of his arrest.

The Board found that Plaintiff was guilty of violating Rule of Conduct 20 ("Failure to submit immediately a written report that any member, including self, is under investigation by any law enforcement agency other than the Chicago Police Department"), by failing to submit a report of the arrest.

At the hearing, the Department presented arresting officer Krieger, who testified that at the scene of the arrest Plaintiff's eyes were red and watery, that Plaintiff smelled of alcoholic beverages, and that Plaintiff stated he had had a beer "here and there." The arresting officer also stated that he performed a horizontal gaze nystagmus ("HGN") test which indicated that Plaintiff was intoxicated, as well as the standard field sobriety tests. The arresting officer testified that the Plaintiff failed to perform either the one-legged test or walk-and-turn test successfully. The arresting officer further stated that Plaintiff refused to take a breathalyzer test, and that after the

arrest, Plaintiff begged the arresting officer to "make the arrest go away" and became verbally abusive when the arresting officer refused. Plaintiff presented a witness who stated that the arresting officer had a poor reputation for truth, and the Department presented a rebuttal witness who stated the opposite.

The Department also presented Officer Kaiser, who arrived on the scene after Plaintiff had been pulled over but before his arrest. Kaiser testified that Plaintiff smelled of alcoholic beverages and that Plaintiff's speech and posture seemed consistent with someone who was attempting to mask intoxication.

The Department also put on expert witness Dr. Citak, who testified as to the reliability of HGN testing as an indicator of intoxication. Dr. Citak also testified that the arresting officer performed the HGN test incorrectly, but that based on a video footage of the sobriety tests taken from a camera in the arresting officer's vehicle, his expert opinion was that Plaintiff had been intoxicated.

Plaintiff testified in his own defense, saying that before being pulled over, he had been at a bar with several friends who had become intoxicated, but that he had not because he had been drinking only non-alcoholic beer. Plaintiff also stated that he had been unable to perform the one-leg test because he has medical problems with his knees and hips, and that he refused to take the breathalyzer test because he did not trust the arresting officer, whom Plaintiff believed was behaving unreasonably.

Plaintiff's testimony was corroborated by David Villarreal, who testified that he had been at the bar with Plaintiff and confirmed that Plaintiff had only been drinking non-alcoholic beer. Villarreal further stated that he had not testified at Plaintiff's criminal trial because he had been recovering from surgery, divorcing his wife and dealing with her drug problems, and because Plaintiff had not wanted to get him involved.

Plaintiff also presented expert witness Joseph Flores, a retired police officer and instructor in HGN testing. Flores testified that the arresting officer had performed the HGN test incorrectly, and that he could not conclude from the video footage whether Plaintiff had been intoxicated.

In addition to relying upon the testimony of the above witnesses, the Board saw the video footage of the sobriety tests and arrest. Also introduced into evidence were the arresting officer's diploma for field sobriety testing, the extensive *curriculum vitae* of Department expert Dr. Citak, a declaration from the American Optometric Association declaring that HGN testing is reliable, a letter from Dr. Citak detailing the expert opinion he drew from watching the video footage, Plaintiff's booking record, a photo of Plaintiff from his booking record, a letter from Dr. Citak stating that HGN testing is a reliable means of determining intoxication, and copies of the state laws and department rules relevant to this case. The evidence also included the *curriculum vitae* of Plaintiff expert Mr. Flores, a letter from Flores detailing the expert opinion he drew from watching the video footage, and a manual from the National Highway Traffic Safety Administration detailing the proper way to perform an HGN test.

FINDINGS OF THE BOARD

The Board found that Plaintiff had at the time of his arrest been an officer with the Department of Police of the City of Chicago, that charges had been filed in writing and that Plaintiff had received proper notice, and that Plaintiff had appeared at the hearing and been represented by legal counsel.

After determining that Plaintiff had, in fact, been driving under the influence of alcohol on the night in question and that he failed to report the incident to his supervisor, the Board considered Plaintiff's complimentary and disciplinary history. In light of his prior 30-day suspension for driving under the influence, the Board ordered Plaintiff's discharge.

PLAINTIFF'S ARGUMENTS

Plaintiff argues that the HGN test was incorrectly performed and as such, should not have been considered by the Board. Without the HGN test, Plaintiff contends that a finding that he had been intoxicated would have been against the manifest weight of the remaining evidence.

Plaintiff also argues that if the court finds that Plaintiff's intoxication was against the manifest weight of the evidence, then his discharge would have been an unduly harsh punishment for the remaining charges. Because the court determines that the finding that Plaintiff was intoxicated was not against the manifest weight of the evidence, this contingent argument is moot.

RESPONDENT'S ARGUMENTS

The Department concedes that the HGN test was improperly performed, but contends that the expert opinion Dr. Citak drew from the flawed test was admissible, even if the arresting officer's testimony regarding the test and in the conclusions he drew from it was not. Furthermore, The Department argues that even without the HGN test, the Board's finding would not have been against the manifest weight of the remaining evidence.

STANDARD OF REVIEW

In an action under the Administrative Review Law, factual determinations by an administrative agency are held to be *prima facie* true and correct, 735 ILCS 5/3-110, and will not be disturbed on review unless they are against the manifest weight of the evidence. *Int'l Union of Operating Eng'rs, Local 148 v. Ill. Dep't of Employment Sec.*, 215 Ill. 2d 37, 61 (2005). A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident from the record, or the finding is unreasonable, arbitrary, and without basis in the record. *Lyon v. Dep't of Children & Family Servs.*, 209 Ill. 2d 264, 271 (2004). If the record contains evidence to support

the agency's decision, it should be affirmed. *Abrahamson v. Ill. Dep't of Prof'l Regulation*, 153 Ill. 2d 76, 88 (1992). When examining the record, the reviewing court must look at all evidence tending to oppose or support the agency's findings. *Polk v. Pension Bd. of Trs. of the Police Pension Fund*, 253 Ill. App. 3d 525, 536 (1st Dist. 1993). The court may not reweigh the evidence to determine where the preponderance lies, or evaluate the credibility of the witnesses. *Berkley v. Ill. Dep't of Children & Family Servs. (In re Austin)*, 214 Ill. 2d 31, 56 (2005). The fact that an opposite conclusion may be reasonable or that the court may have ruled differently does not justify reversal of administrative findings. *Robbins v. Pension Bd. of Trs. of the Carbondale Police Pension*, 177 Ill. 2d 533, 538 (1997). Moreover, the mere existence of conflicting testimony is not sufficient grounds to reverse an agency's decision as being against the manifest weight of the evidence. *Finik v. Dep't of Employment Sec.*, 171 Ill. App. 3d 125 (1st Dist. 1988). The court owes substantial deference to the fact-finder, who is in a superior position to assess the witnesses' credibility. *Branson v. Dep't of Revenue*, 168 Ill. 2d 247 (1995).

DISCUSSION

The court finds that the determination of the Board was not against the manifest weight of the evidence. Even without considering the HGN test, the video footage and the testimony of both the arresting officer and Officer Kaiser formed a sufficient basis for the Board's decision. Furthermore, nothing in the testimony of Plaintiff's witnesses leads this court to conclude that the Board's decision was against the manifest weight of the evidence.

HGN TEST

Between the arrest and the hearing in this case, the practice of HGN testing was subjected to a *Frye* hearing in another case, which was later addressed by the Supreme Court of Illinois in

People v. McKown, 236 Ill. 2d 278 (2010) (holding that the admissibility of HGN evidence depended upon the State's ability to lay a proper foundation and to demonstrate the qualifications of its witness, subject to the balancing of probative value with the risk of unfair prejudice). Both parties made persuasive arguments as to why, pursuant to *McKown*, the Board in this case should or should not have considered the evidence that was based upon the HGN test. But the court need not address those arguments because it finds that even without the HGN test, a finding that Plaintiff had been intoxicated is not against the manifest weight of the evidence.

Because the court need not consider the admissibility of the HGN test, it does not consider the expert testimony of Dr. Citak, nor the portions of the testimony of either the arresting officer or of Mr. Flores that relate to the HGN test.

VIDEO FOOTAGE

Plaintiff urges the court not to consider either the video footage of the sobriety tests and arrest or any testimony based upon it because the DVD on which the footage was recorded lacks audio. More specifically, Plaintiff argues that the footage is unreliable because the arresting officer could have said something that would have interfered with Plaintiff's performance of the sobriety tests. Plaintiff does not affirmatively state that such statements were made, nor does he suggest what such statements would have had such an effect, and the court declines to speculate. As such, the court takes the video footage at face value, and finds that it is consistent with both Plaintiff's and the Department's versions of events.

WITNESSES

The court finds that the testimony of the arresting officer and Officer Kaiser was a sufficient basis for the Board's finding that Plaintiff had been intoxicated on the night in question. Plaintiff

urges the court to disbelieve their testimony, suggesting that it is the product of acrimony between Big City and Small Town police officers. But the court owes substantial deference to the fact-finder, who is in a superior position to assess the witnesses' credibility. *Branson v. Dep't of Revenue*, 168 Ill. 2d 247 (1995). Bolstering the substantial deference owed to the Board, the court notes that here, the members of the Big City Board found the Small Town officers more credible than their fellow Chicago police officer.

Officer Krieger

Plaintiff and the Department each presented a witness who testified regarding the arresting officer's reputation for truthfulness. As previously noted, the court defers to the Board's decision that he was credible.

According to the arresting officer, Plaintiff smelled of alcoholic beverages, had red and watery eyes, and stated that he had consumed several beers. Plaintiff failed to perform the one-legged test and blamed the failure on a medical disability. Furthermore, Plaintiff was unable to follow directions during the walk and turn test, and he refused to submit to a breathalyzer test. Following the arrest, Plaintiff exhibited consciousness of guilt by begging the arresting officer to make the arrest go away, and he further displayed impaired judgment by calling the arresting officer a homosexual whose wife would be unfaithful to him.

Officer Kaiser

According to Officer Kaiser, Plaintiff smelled of alcohol, and he spoke and carried himself in a manner consistent with individuals attempting to mask intoxication.

Plaintiff's Witnesses

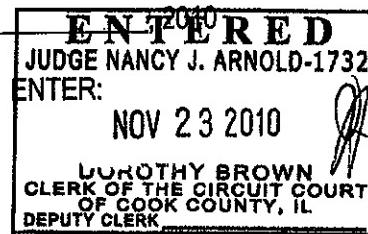
The Board's findings were contrary to the testimony of both Plaintiff and Mr. Villarreal, but the court is not convinced they went against the manifest weight of the total evidence. In his defense, Plaintiff testified that he had been drinking only non-alcoholic beer prior to his arrest, but that he had not thought to mention that fact to either the arresting officer or to the Internal Affairs officers a year later. Mr. Villarreal confirmed that he saw Plaintiff drinking only non-alcoholic beer at the bar. Plaintiff also stated that his inability to stand on one leg was due to a medical disability, and that he had refused to take the breathalyzer because he did not trust the arresting officer, whom Plaintiff believed was acting unreasonably. Plaintiff further denied that he either begged the arresting officer to let him go or that he became verbally abusive. Finally, Plaintiff testified that the arresting officer gloated over arresting a Chicago police officer.

Aside from confirming the shortcomings in the arresting officer's HGN test, Mr. Flores stated only that he could not form a conclusive expert opinion based on the video footage.

After reviewing the testimony of the witnesses presented by both Plaintiff and the Department, and after viewing the video footage of the events in question, the court finds that the Board's determination that Plaintiff had been driving under the influence of alcohol and that he failed to report the incident was not against the manifest weight of the evidence. Having reached this conclusion, the court need not consider either the issues relating to the HGN test, or whether discharge would have been an unduly harsh punishment for the mere failure to report his arrest.

DISPOSITION

For the foregoing reasons, IT IS HEREBY ORDERED THAT the order of discharge by the Police Board of the City of Chicago dated July 16, 2009 is AFFIRMED.



Judge Nancy J. Arnold